Juvenile Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: November 8, 2019

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong, Professor Barbara Atwood, Beth Beckmann (by telephone), Beth Beringhaus, Dale Cardy, Kathleen Coughlin, John Gilmore, Magdalena Jorquez, Hon. Joseph Kreamer, Tina Mattison, Donna McQuality, Eric Meaux, William Owsley, Christina Phillis, Hon. Maurice Portley, Hon. Kathleen Quigley, Beth Rosenberg, Denise Avila Taylor, Hon. Patricia Trebesch, Edward Truman, Kent Volkmer, Hon. Rick Williams, Hon. Anna Young

Absent: Maria Christina Fuentes, Denise Smith

Guests: Carey Turner, Ana Namauleg, Shari Andersen-Head, Nina Preston, Chanetta Curtis, Jessica Fotinos, Cheri Clark

AOC Staff: Caroline Lautt-Owens, Joseph Kelroy, Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the second Task Force meeting to order at 10:00 a.m. She noted that workgroups met 5 times after the September 27 Task Force meeting, and she commended the members' efforts in getting 12 rules ready for review today. Today's meeting packet contains clean and redline versions of those 12 revised rules, along with additional materials prepared by Judge Armstrong and Judge Warner, a comment that the Solicitor General filed in R-00-0004, and draft minutes of the September 27 Task Force meeting. The Chair advised that it would be useful for members to bring their rule books to Task Force meetings to compare proposed rule revisions with the current rules. She requested that in the future, members make edits only in the "rules by numbers" folder on SharePoint, and that they no longer utilize the "member drafts" folder, which was intended for use only until the first round of workgroup meetings. Use of the "rules by numbers" folder will avoid duplicate drafts of individual rules and will assist staff with version control. During the afternoon session of today's meeting, Ms. Pennington reviewed with members the process for locating, editing, and saving documents in the "rules by number" folder on SharePoint. She invited members to contact her if they needed additional assistance.

The Chair noted a correction in the September 27 draft meeting minutes at page 4: proposed comment titles should be "comment to the 2022 amendment" rather than "comment to the 2021 amendment." The Chair asked members if there were other necessary corrections, and there were none.

Motion: A member then moved to approve the September 27, 2019 meeting minutes with the noted correction. The motion received a second and it passed unanimously. **JRTF 002**

Before proceeding to today's rules, the Chair advised Task Force members that they should strive to develop consensus on each draft rule, but she does not anticipate a vote during Task Force meetings following the presentation of a rule. Rather, members will formally vote to approve the rules later. She explained that initial drafts, even those on which the members have reached consensus, might require subsequent revisions after they consider other rules or additional issues. Deferring a vote to approve the rules until completing the review will allow the process to be more flexible and meaningful. Members had no objection to proceeding in this manner.

2. Report from Workgroup 1. Judge Kreamer, Judge Armstrong, and Ms. Mattison presented Workgroup 1's rules.

Rule 1 ("scope and construction"). Judge Kreamer noted that current Rule 1 is lengthy, but it has only a single sentence on "applicability," and instead addresses at length other subjects, including definitions and document formatting. The workgroup concluded that Rule 1 should be introductory, like the corresponding civil, criminal, and family rules, and that topics like "definitions" and "formatting" should be contained in separate, standalone rules. Accordingly, the workgroup limited its proposed Rule 1 to two concise sections, one on "scope" and the other on "construction."

Section (a) on scope would include two additional areas that are omitted from the applicability provision in current Rule 1: in-home intervention and extended foster care.

During its discussion of section (b) on construction, the workgroup contemplated who would construe these rules. The corresponding civil, criminal, and family rules address this question differently. The workgroup concluded that "parties should use" the juvenile rules, and "courts should construe and enforce them, in a manner that is in the child's best interests…." A member did not think the phrase "in the child's best interests" was an appropriate principle of construction for the delinquency rules, and that a reference to protecting "constitutional rights" would be more suitable. Other members thought the "best interests" included "constitutional rights," or that "protects the child's rights and interests…" would be a more appropriate alternative. Another member observed that parents in dependency proceedings and victims in delinquency proceedings have rights that also require protection. One member noted that subsequent, more specific rules, as well as statutes, have provisions for protecting parties' rights, so including a similar provision in Rule 1 would be redundant. (As examples, Rule 21 addresses victims' rights; and the "interpretation" provision of Rule 36(b) refers to interpreting the dependency rules to "protect the child's best interests.") After further discussion, members agreed to remove from Rule 1(b) the phrase that requires

construction of the juvenile rules in manner that "is in the child's best interests." Ms. Jorquez requested permission to obtain further input from her DCS colleagues concerning this revision, which the Chair granted; but otherwise, members approved the rule with today's modifications.

Rule 2 ("definitions"). Judge Armstrong observed that the current juvenile rules do not include a rule with a comprehensive set of definitions, and draft Rule 2 would fill that gap. He noted that numerous other definitions are included in A.R.S. Title 8, and the list of definitions in Rule 2, although lengthy, is not intended to include all the statutory definitions. Draft Rule 2 is an evolving rule, and Judge Armstrong anticipates other definitions will be added, or existing definitions will be modified, as the Task Force progresses. He asked members to continue to suggest terms that Rule 2 should define. One member suggested a definition—or possibly a new rule—concerning the Interstate Compact on the Placement of Children. Another member requested a definition of ADJC. Judge Armstrong then noted several defined terms in draft Rule 2.

(1) "Fiduciary" appears only in Rule 104 and the word is undefined in that rule. Judge Armstrong derived a definition of "fiduciary" from the Probate Code because Rule 104 seems to refer to persons appointed under Title 14 statutes. But members believed a definition of "fiduciary" might be unnecessary if Workgroup 1, which is assigned Rule 104, uses an alternative term in that rule, such as "party representative." Members agreed to retain Judge Armstrong's proposed definition of "fiduciary" in Rule 2 pending the workgroup's review of Rule 104.

(2) "Guardian ad litem ('GAL')" has not yet been defined and now appears in draft Rule 2 only as a placeholder. Judge Armstrong suggested that if a definition becomes necessary, it might say that a GAL is "a person appointed by the court to represent a party's best interests." A member observed that the GAL's function is not always to do what is in the party's best interests, but Judge Armstrong noted a court-appointed GAL customarily acts in a party's best interests. Another member noted that a GAL can have many roles and proposed that the definition say, "to represent a party's best interests or as further directed by the court." Judge Armstrong also observed that current Rule 40 ("appointment of guardian ad litem") lacks a comprehensive definition of GAL. He will present a proposed definition of GAL at a future meeting. Members also discussed whether a court-appointed GAL must be an attorney. While smaller counties may appoint a non-attorney GAL as a matter of necessity, those appointments can raise complications and concerns. Judge Young might bring the issue of non-attorney GAL appointments to the Committee on Juvenile Court.

(3) Judge Armstrong added a definition of the Family First Prevention Services Act ("FFPSA"). However, if Arizona adopts its own statutory version of the federal act, the definition may instead refer to the Arizona statutes.

(4) "Juvenile" is patterned after the current definition in Rule 1(b). However, saying that it means a person under the age of 18 (or age 19 in the delinquency context) would omit older youths who are in an extended foster care program and still under the jurisdiction of the juvenile court. Judge Armstrong will work with Mr. Truman to fashion a broader definition.

Rule 3 ("priority of proceedings; conducting proceedings; applicability of other rules"). Judge Armstrong explained that Rule 3 was a new juvenile rule, but sections (a) ("priority"), (b) ("informality") and (c) ("order of trial") were modeled on provisions found elsewhere in the current juvenile rules. Sections (d) ("applicability of other rules of procedure") and (e) ("applicability of the Arizona Rules of Evidence") were borrowed from other recently restyled rule sets. Judge Armstrong discussed each of these five sections with the members, but proposed section (e) generated the greatest discussion.

In preparing his draft of section (e), Judge Armstrong reviewed the current juvenile rules and located 17 references to evidentiary standards or the Arizona Rules of Evidence. He asked members whether the draft rules should continue to include these 17 references, or whether the draft should instead propose a unified standard. A unified standard might say, "Any non-privileged evidence tending to make a fact at issue more or less probable is admissible under the court determines the evidence lacks reliability or will cause unfair prejudice, confusion, or waste of time." Judge Armstrong also cited to recently restyled Probate Rule 4(a); under that rule, the evidence rules apply in contested proceedings unless the parties agree otherwise, and they do not apply in uncontested proceedings, where all relevant evidence is admissible unless its probative value is outweighed by specified factors. The alternative to the unified standard is a rule that would say that the Evidence Rules apply except as provided in the 17 other Juvenile Rule provisions, which would leave those current provisions intact. Members generally supported the unified standard, which would eliminate the need for multiple references to the Evidence Rules and would be helpful to judges and practitioners. Judge Armstrong proposed locating the unified standard in a new Rule 3.1. However, one member cautioned about the unintended consequence of changing the meaning of those 17 rule references by integrating all of them into a single rule. Another member suggested that there should be higher standards for the admissibility of evidence in a termination proceeding than in a dependency action. Judge Armstrong will consider these comments and present a draft of Rule 3.1 at a future meeting.

The other aspect of draft Rule 3(e) that required discussion was the admissibility of expert reports. Expert reports in juvenile proceedings are generally admissible if they are timely disclosed and the author is available to testify. Judge Armstrong noted that whether the author is available to testify is a confusing and undefined concept. Judge Warner's suggested definition of "available for cross-examination" was based on whether the expert is "subject to the court's subpoena power," unless the person is subpoenaed but is then unable or unwilling to comply with the subpoena. Members would like the workgroup to revisit Judge Warner's draft and recommended an

improved version that would be located either in Rule 3 or, possibly, in Rule 45 ("admissibility of evidence").

***Rule 4 ("Indian Child Welfare Act ['ICWA']).*"** Ms. Mattison reviewed the draft rule, which is based on current Rule 8. Section (a) ("application") is a more concise statement of current section (a). Section (b), "inquiry," is new and requires the court to inquire at the start of "any" dependency, termination, or guardianship proceeding if any party has reason to believe the child is subject to ICWA. The requirement derives from A.R.S. § 8-815, and although some members believe the requirement is burdensome and unrealistic, it is statutorily mandated. (The federal requirement is "knows or has reason to know." The draft rule and the Arizona statute say "believes," which appears to be broader than "knows.") Members might later consider relocating this inquiry requirement to the dependency rules. In draft Rule 4(e) ("jurisdiction"), the workgroup changed "foster placement," which is the term used in federal law, to "out of home placement," which members believe includes foster placement. The workgroup recommends deleting the lengthy comment to the current rule.

Members also discussed concerns about repeated references to ICWA throughout the juvenile rules. One member would prefer to see ICWA provisions confined to a single rule, with a comment to the rule containing links to ICWA and the Arizona Supreme Court's guide on ICWA. Solicitor General Scott Bales' comment in R-00-0004 cautioned against paraphrasing ICWA in the juvenile rules or selectively referring to portions of ICWA's requirements. Although members supported the idea of a comment with pertinent hyperlinks and the reduction of repetitive ICWA references, they agreed to defer consideration of those alternatives until they review the remaining rules.

3. <u>Report from Workgroup 4.</u> The Chair then asked Professor Atwood to present Workgroup 4's rules.

Rule 61 ("motion, notice of hearing, service of process, and order for permanent guardianship"): Professor Atwood noted that the current rule is relatively complex and difficult to follow. Among other reasons, the rule applies to both pre- and post-dependency adjudication guardianships. The workgroup's draft rule attempts to clarify the procedural distinctions of each proceeding.

Professor Atwood then reviewed draft section (a) ("motion"). A member asked the workgroup to further clarify that the last sentence of that draft section applied only to pre-adjudication guardianships. Members also discussed who can file a pre-adjudication guardianship motion. Although members initially disagreed on who could file this motion, Professor Atwood cited A.R.S. § 8-871(A)(1) as authority that only the DCS could do so. The issue of filing the motion is further complicated in circumstances where the child has been adjudicated dependent in a proceeding as to one but not both parents. A judge member noted that the legislative intent in adopting this statute was to facilitate DCS's ability to establish a guardianship early in the process, without the

necessity of a dependency adjudication. Another member observed that the workgroup's draft deleted a consent provision that is a statutory requirement for a pre-adjudication motion, and the workgroup will need to add that back.

In section (b) ("notice of hearing"), members substituted a phrase used in the current rule, "information required by law," with "information required by A.R.S. § 8-872." However, Professor Atwood questioned whether this change was accurate or even necessary, and after discussion, members agreed to remove that phrase. Section (c) ("service") of the current rule is a long block paragraph; the workgroup reorganized the provision for clarity. Members discussed whether service under ICWA could be made by certified mail rather than registered mail because certified mail is less expensive, but members agreed to use registered mail because that's what the federal statute requires.

During their discussion of section (d) ("hearing involving an Indian child"), members again considered reducing repetitive references to an ICWA requirement for service. But other members believed that having the requirement appear in multiple rules would assist judges and practitioners in determining when the requirement applies. The workgroup could not locate legal authority for the requirement that a parent who requests a hearing under this section must do so by registered mail, and it eliminated that requirement in this section. Section (e) ("service of the notice of hearing on other persons") was also reorganized by separating it from the general service provisions of section (c).

Section (f) (now, "investigation and report") was derived from current section (D) ("orders") and given a new title that more accurately describes the section's subject matter. Members discussed repeating the content of this section in Rule 62 but declined to do so. They also (1) in (f)(1) eliminated the word "the" before "DCS" (this should be a global edit); (2) changed the requirement in (f)(1) that the court "must" order DCS to prepare a report to "may," because A.R.S. § 8-872(E) allows the court to waive the requirement; (3) modified (f)(2) to allow a party, rather than only the child's attorney or GAL, to prepare the report; and (4) decided to remove (f)(4) concerning the filing of a report, because it is not merely filing the report, but rather, its admission into evidence, that allows a judge to consider it. The workgroup extracted from this section a provision on "other orders," which does not pertain to reports, and that new section is now section (g).

Rule 62 ("initial guardianship hearing"). The draft rule is generally modeled on current Rule 62, but certain portions have been reorganized to enhance clarity and to eliminate redundancy with items already covered by Rule 61. Professor Atwood also noted that the workgroup used the word "attorney" rather than "counsel" throughout this rule.

One provision that prompted discussion was section (c) ("procedure"), subpart 7, which requires the court to determine whether the parent admits, denies, or does not contest the motion. The subpart contains another alternative: that the parent failed to

appear. In that circumstance, the draft allows the court to proceed with adjudication of the motion if the parent had notice of the hearing and had received specified admonitions concerning the consequences of a non-appearance. Professor Atwood advised that the workgroup would like to further consider the consequences of non-appearance following the Supreme Court's recent *Tricia A.* opinion. For example, should Rule 62(c) include a list of additional requirements that the court must consider before proceeding with an adjudication following a non-appearance? Should a motion to set aside an adjudication following a non-appearance require the moving party to demonstrate a meritorious defense? Alternatively, should Form 2 contain this requirement? Should the Task Force consolidate Forms 1 and 2 and call them "advice to parent in a dependency action?"

A judge member questioned a requirement in section (d) ("findings and orders") that the judge make specific findings that the court advised the parent of the consequences of failing to appear at a future proceeding. Should the requirement be revised to simply require the court to give the advice, rather than the court find that it gave the advice? Alternatively, could it say that the court is required to give the parent the form, and then make a finding that it provided the form? The Chair believes a reviewing court would find it useful if the record contained the findings required by the workgroup's draft, and that due process is served by making those findings.

A member noted that draft Rules 61 and 62 do not address the timing of pre-adjudication hearings for permanent guardianship. But Rule 62(b) provides that the court may "order or permit otherwise [the time for the hearing]", and this should provide the court with the necessary flexibility.

Workgroup 4 will revise Rules 61 and 62 to conform to today's discussions.

4. **Report from Workgroup 2.** Ms. Phillis, who presented today's rules for Workgroup 2, advised that in the future, the workgroup will propose a reorganization of the delinquency rules in a manner that makes them sequential, i.e., that follows the order in which delinquency proceedings occur.

Rule X ("scope of the delinquency rules"). This rule is new and has not been assigned a number. It has two sections: (a) ("application"), and (b) ("incorrigibility"). Section (a) recognizes that delinquency proceedings may still occur in limited jurisdiction courts. A member suggested, and Ms. Phillis agreed, that in section (a), the word "delinquency" can be removed in the phrase "these delinquency rules." Section (b)'s reference to incorrigibility ("courts should construe the delinquency rules as applicable to incorrigibility proceedings") should eliminate the need to say "and incorrigibility" after "delinquency" because section (b) clarifies that these rules apply to both. Members generally approved the rule as presented and modified today.

Rule XX ("definitions"). Ms. Phillis explained that this rule, which replaces current Rule 9 ("definitions") does not currently contain any definitions, but this rule will serve as the placeholder for future definitions of delinquency terminology.

Rule 10 ("appointment of an attorney"). Ms. Phillis reviewed the four sections of this draft rule. Like Workgroup 4, Workgroup 2 prefers the word "attorney" rather than "counsel." In section (a) ("right to an attorney"), a member suggested adding for completeness, after the phrase "initiated by a petition," the words "or a citation," and Ms. Phillis agreed. The same words will be added after "a petition" in section (b).

Section (b) ("appointment of an attorney") is new. To facilitate appointments upon the filing of a petition, the draft says that "a juvenile is presumed indigent." The workgroup reasoned that if the juvenile was not presumed indigent, the court could not make a finding of indigency, and consequently appoint an attorney, until the juvenile's initial court appearance, and that might impede the efficiency of the advisory hearing. However, members were concerned with creating a presumption of indigency, and thought, for example, that the presumption might be rebutted if the juvenile was employed. Accordingly, and to shift away from the connotations of a presumption, members agreed to change the wording in section (b) to say instead that a juvenile is "deemed indigent."

The subject of appointments led to a discussion about assessing the cost of a court-appointed attorney, which is addressed by draft section (d) ("assessment of the cost of court-appointed attorney"). If the juvenile has adequate resources (e.g., a trust fund), could the court assess the juvenile (in addition to a parent or custodian) for that cost? Ms. Phillis referred to A.R.S. § 8-221(G), which allows the court to make the assessment. Members revised section (d) to reflect the court's ability to do that; they also agreed to revise this section to allow the court to make appropriate inquiries concerning the juvenile's financial resources. They will further revise this provision to clarify that it's the juvenile's own financial resources, and not the parents', that determines the juvenile's ability to pay. Draft section (d) does not allow the court to make the assessment against the DCS, ADJC, or a foster parent, but to expand the application of this provision to any individual who might be receiving financial assistance from the State, members changed "foster parent" to "out of home placement under court supervision."

Section (e) ("waiver of counsel") prompted a discussion of a juvenile waiving counsel because of pressure from a parent who wants to avoid an assessment for the cost of a court-appointed attorney. However, the terms of this provision should not preclude a parent from hiring an attorney for a child, even when the child is indigent, and the workgroup will consider this issue and present a revised provision at a future meeting. Ms. Phillis noted that the workgroup has added a new requirement of a colloquy between the juvenile and the court to assure that any waiver of counsel is knowing, intelligent, and voluntary. Members agreed to delete a sentence shown with strikethrough at the

end of section (e) that would have required the court to impose safeguards on the waiver if there's a conflict of the interests of the juvenile and a parent.

Rule 11 (attorney's appearance). The draft rule, like the current rule, has two sections, and the workgroup revised both. Section (a) would permit counsel to file a notice of appearance or to orally announce an appearance in open court. For case management systems, it might be preferable to require counsel to file a written notice of appearance and a written notice of withdrawal. Nonetheless, Rule 10 requires the court to issue a minute entry when it appoints counsel, so appointments of those attorneys should already be reflected in the case file. Draft section (b) ("withdrawal of an attorney") pertains only to court-appointed counsel. It automatically relieves the attorney of representing a juvenile if no further hearings are scheduled and the time for filing a notice of appeal has expired. A member raised an issue that court-appointed attorney contracts in some Arizona counties require the attorney to remain as counsel of record for 6 months after case completion, but members did not believe this contractual provision would undermine the application of the draft rule. Members discussed a process that would allow retained counsel to withdraw by notice versus by motion. Members agreed that the draft was deficient because it did not address the withdrawal of retained counsel, and Rule 11 was returned to the workgroup for further revision. Members also requested the workgroup to consider whether probation officers or GALs should receive copies of filings concerning withdrawal.

5. **Report from Workgroup 3.** Judge Quigley presented Workgroup 3's rules.

Rule 36 ("scope of rules"). Current Rule 36 is a standalone subpart of the dependency, guardianship, and termination rules in Part III. The workgroup eliminated this unnecessary subdivision and instead made Rule 36 the first rule in a larger subpart on "general provisions." Draft Rule 36 separates the substance of current Rule 36 into two sections, section (a) on "application" and section (b) on "interpretation." The workgroup added "in-home intervention" and "extended foster care" to the content of section (a). In section (b), the workgroup considered deleting the phrase, "and gives paramount consideration to the child's health and safety." However, because the provision omits any reference to parental rights, and especially after hearing the discussion earlier today concerning Rule 1, the workgroup would like to revisit this rule and bring it back to the Task Force at another meeting.

Rule 37 ("meaning of terms"). Judge Quigley explained that the workgroup expanded the definition of "participant" to encompass multiple placements and multiple tribes, but the workgroup will need to improve upon the awkward phrase "or more than one of the foregoing." Members agreed with the workgroup's decision to retain the first six "definitions under ICWA" in section (c) ("parent," Indian child," "Indian child's tribe," "Indian custodian," "Indian tribe," and "extended family member") and to relocate the seventh definition ("foster care or pre-adoptive placement preferences") because it is more substantive and is not merely a defined term. Because subpart (c)(7)

was in the draft, staff initially titled Rule 37 "meaning of terms," but in anticipation of its relocation, members agreed to change the title of Rule 37 to "definitions." During a broader discussion of ICWA, members asked the workgroup to consider adding to Rules 40 ("appointment of guardian ad litem"), 40.1 ("duties and responsibilities of appointed counsel and guardians ad litem"), or 40.2 ("duties and responsibilities of appointed counsel for parental representation") a duty to have knowledge of ICWA.

Rule 38 ("assignment and appointment of an attorney"). Like the other workgroups, Workgroup 3 utilized "attorney" rather than "counsel." Members agreed that the process of assigning attorneys in dependency cases before their appointment was effective, but the workgroup might relocate draft subpart (a)(3), which describes limitations on the role of an assigned attorney. The workgroup will also determine the appropriate statutory reference in section (b) ("appointment of an attorney"), and whether it's necessary or helpful to include the reference in this rule.

6. **Roadmap.** To equalize the presentation time of each workgroup, the Chair will endeavor to take workgroups in a different order at future Task Force meetings. The Chair observed that there are recurring topics in the juvenile rules, and members should identify and consider those topics early in this project, which might expedite later discussions. The next Task Force meeting is set for **Friday, December 13, 2019**, beginning at **10:00 a.m.** in **Room 119**. The Chair also noted that each workgroup has a meeting scheduled in November.

7. **Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 2:21 p.m.